

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

-----X
IN RE ENRON CORPORATION
SECURITIES LITIGATION
-----X

: Consolidated Civil Action
: No. H-01-3624
:

This Document Relates To:

MARK NEWBY, et al., individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

ENRON CORPORATION, et al.,

Defendants.
-----X

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA, et al., individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

KENNETH L. LAY, et al.,

Defendants.
-----X

United States Courts
Southern District of Texas
FILED

SEP 30 2003

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Michael N. Milby, Clerk

**RESPONSE OF MERRILL LYNCH & CO., INC. AND
MERRILL LYNCH, PIERCE, FENNER & SMITH INC. TO
PLAINTIFFS' SUPPLEMENTAL OPPOSITION TO MOTION TO DISMISS**

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and Merrill Lynch, Pierce, Fenner & Smith Inc.

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Defendants Merrill Lynch & Co., Inc. and Merrill Lynch, Pierce, Fenner & Smith Inc. (together, "Merrill Lynch") respectfully submit this response to Lead Plaintiff's Supplement to Opposition to Motions to Dismiss Filed by JP Morgan, Citigroup and Merrill Lynch, dated September 23, 2003 ("Plaintiffs' Supplement").

Plaintiffs' Supplement attaches several documents, purportedly "[f]or purposes of the Court's consideration of defendants' motions to dismiss." Pl. Supp. at 1. Plaintiffs do not, however, explain why the documents are appropriate for consideration on the motion to dismiss, nor how the documents impact the issues before the Court.

In fact, the two documents concerning Merrill Lynch attached to Plaintiffs' Supplement have nothing at all to do with the issues presented by Merrill Lynch's motion to dismiss. Merrill Lynch's motion was based principally on two grounds: (1) plaintiffs failed to plead a primary violation of the securities laws by Merrill Lynch, but at most alleged that Merrill Lynch aided and abetted Enron's violation of Rule 10b-5; and (2) plaintiffs failed to allege loss causation arising from Merrill Lynch's involvement in the so-called Nigerian Barge Transaction and Power Swaps.

Neither Merrill Lynch's agreement with the Department of Justice, nor the indictment of three former Merrill Lynch employees, in any way impacts these two issues. Indeed, if anything, the indictment lends further support to Merrill Lynch's motion, because the three former employees were charged only with conspiracy to commit wire fraud and falsify books and records. Conspiracy, like aiding and abetting, is not actionable by private plaintiffs under Rule 10b-5. *See In re Enron Corp. Sec. Litig.*,

235 F. Supp. 2d 549, 591 (S.D. Tex. 2002) (citing *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 841 (2d Cir. 1998)).

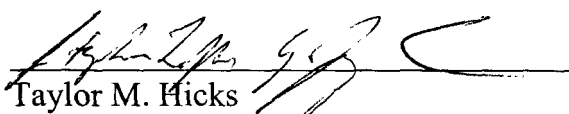
Both the requirement of pleading a primary violation of the securities laws and the requirement of pleading damages caused by the primary violation are elements of a private civil securities fraud action that simply do not apply to criminal or regulatory authorities. In this private action, the Court must focus on these unique requirements, and should not be swayed by plaintiffs' efforts to prejudice the Court's view of the defendants by reference to irrelevant criminal or regulatory proceedings.

For these reasons, the Court should disregard Plaintiffs' Supplement, and should grant Merrill Lynch's motion to dismiss.

Dated: September 30, 2003.

Respectfully submitted,

HICKS THOMAS & LILIENSTERN, LLP

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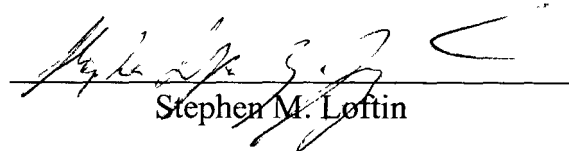
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument, **Response of Merrill Lynch & Co., Inc. and Merrill Lynch, Pierce, Fenner & Smith Inc. to Plaintiffs' Supplemental Opposition to Motion to Dismiss**, was served upon all known counsel of record by website, <http://www.es13624.com>, on this the, on this the **30th** day of **September, 2003**.

Please See Attached Service List


Stephen M. Loftin

The Service List

May be Viewed

in the

Office of the Clerk